Supreme Court, U. S.
FILED
JUL 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 77-1431

UNITED STATES OF AMERICA,

Respondent,

vs.

VITO MANGO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Vito Mango, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 21, 1977.

Respectfully submitted,

THOMAS L. TWYFORD
Attorney for Petitioner

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit affirming petitioner's conviction in the United States District Court, Southern District of Ohio, Eastern Division, is printed in the Appendix hereto, at page .

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was entered on June 21, 1977. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1) which provides in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any . . . criminal case, before or after rendition of judgment or decree . . .

QUESTIONS PRESENTED

I. WAS IT PREJUDICIAL ERROR FOR THE TRIAL JUDGE NOT TO CONDUCT SOME INQUIRY AS TO THE COMPETENCY OF A KEY WITNESS WHEN A QUESTION AS TO THAT WITNESS'S MENTAL HEALTH WAS RAISED BY DEFENSE COUNSEL AND FURTHER TO PROHIBIT DEFENSE COUNSEL FROM INQUIRING OF THAT SAME WITNESS ON *VOIR DIRE* AS TO THAT WITNESS'S PREVIOUS CONFINEMENT IN A MENTAL HOSPITAL?

II. WAS IT PREJUDICIAL ERROR FOR THE TRIAL JUDGE TO LIMIT THE SCOPE OF CROSS EXAMINATION OF A KEY PROSECUTION WITNESS; SAID LIMITATION PROHIBITING DEFENSE COUNSEL FROM INQUIRING AS TO THAT WITNESS'S PRIOR CONFINEMENT IN A MENTAL HOSPITAL OR OTHER "INSTITUTIONALIZATION"?

III. WAS IT PREJUDICIAL ERROR FOR THE TRIAL JUDGE TO PROHIBIT DEFENSE COUNSEL FROM INTRODUCING OTHER EVIDENCE AS TO A KEY PROSECUTION WITNESS'S PRIOR CONFINEMENT IN A MENTAL HOSPITAL OR OTHER "INSTITUTIONALIZATION", WHERE SUCH EVIDENCE WAS TO BE USED TO IMPEACH THAT KEY PROSECUTION WITNESS?

IV. WAS PREJUDICIAL ERROR CAUSED BY THE CUMULATIVE EFFECT OF THE ERRORS ALLEGED IN I THROUGH III ABOVE?

V. WHEN UNION RACKETEERING IS CHARGED UNDER 18 U.S.C. §1961 *ET SEQ.*, ARE ALL COUNTS IN SUCH AN INDICTMENT SO INTER-RELATED THAT GRIEVOUS ERROR IN THE TRIAL OF ANY ONE OR MORE COUNTS REQUIRES RE-TRIAL OF ALL COUNTS IN THE INDICTMENT?

VI. SHOULD THE TRIAL COURT HAVE GRANTED THE DEFENSE MOTION FOR

ACQUITTAL AS TO RACKETEERING BECAUSE OF THE GOVERNMENT'S FAILURE TO PROVE BEYOND A REASONABLE DOUBT A FACTUAL NEXUS COMBINING THE PREDICATE CRIMINAL ACTS CHARGED INTO A "PATTERN OF RACKETEERING ACTIVITY"?

VII. WERE THE EMBEZZLEMENT CONVICTIONS INCONSISTENT AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.

Title 29, United States Code, Section 501(c) provides:

> Any person who embezzles, steals or unlawfully and willfully abstracts or converts to his own or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

18 U.S.C. §1961 provides in pertinent part:

> (1) "Racketeering activity" means . . . (B) any act which is indictable under any of the following

> provisions of title 18, United States Code: section 1341 (relating to mail fraud) . . . (C) any act which is indictable under title 29, United States Code . . . section 501(c) (relating to embezzlement from union funds) . . .

18 U.S.C. §1961(5) provides:

> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . .

18 U.S.C. §1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Rule 607, Federal Rules of Evidence provides:

> The credibility of a witness may be attacked by any party, including the party calling him.

STATEMENT OF THE CASE

The petitioner seeks review of the order of the United States Court of Appeals for the Sixth Circuit, No. 76-2615, entered on June 21, 1977, which affirmed petitioner's conviction in the United States District Court, Southern District of Ohio, Eastern Division. In the District Court the case was heard as Criminal Case Number 2-76-67 by the Honorable Joseph P. Kinneary and a duly impaneled jury of twelve and one

alternate. In the trial court, petitioner, Vito Mango, was convicted on six of eight counts; one of racketeering, one of mail fraud and four of six embezzlement charges. A copy of the indictment is in the Appendix hereto at pages 18 through 24.

The basis upon which petitioner seeks review is that the trial judge abused his discretion in improperly limiting the scope of inquiry as to one of the key witnesses for the prosecution and that the convictions were inconsistent and against the manifest weight of the evidence.

During the trial, immediately before the prosecution called Robert Schmidt as a witness, there were proceedings out of the hearing of the jury. The substance of those proceedings is set out on pages 84 and 85 of the trial transcript, which pages are included in the Appendix at pages 24 through 25.

At that point, defense counsel informed the judge that he had learned that Robert Schmidt had been either hospitalized or judicially declared incompetent, but that defense counsel was unaware of the particulars of these events. The government acknowledged that Schmidt had been "institutionalized". Defense counsel requested *voir dire* examination of witness Schmidt to determine his competency. That request was denied. Further, defense counsel was prohibited from inquiring about the witness's institutionalization when questioning him on cross examination. The Appendix, at pages 26 through 38, contains copies of the transcript of the direct and cross examination of witness Robert Schmidt, showing that his institutionalization was never brought out. Defense counsel was further prohibited from introducing other evidence to impeach witness Robert Schmidt on grounds of mental

incompetency as shown by his prior stay in a mental institution. Further, Schmidt's criminal "institutionalization" was not brought out, because of the same restriction.

REASONS FOR GRANTING THE WRIT

The case at bar contains within it special, important and compelling reasons for this Honorable Court to grant Vito Mango's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit. The petitioner raised questions of constitutional and statutory construction which are of fundamental importance to the adversary system of criminal justice.

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees to Vito Mango the right to fully cross examine all of the witnesses against him upon all issues that are relevant to his defense. The action of the trial judge in the United States District Court effectively denied petitioner this right of confrontation. The order of the Sixth Circuit Court of Appeals holding that there was no abuse of discretion on the part of the trial judge in excluding the *voir dire* examination of witness is contrary to a recent decision of this Court. In *Davis v. Alaska*, 415 U.S. 308 (1974, this Court held that denial of the right to effective cross examination constituted "constitutional error of the first magnitude" and no amount of showing of want of prejudice would cure it. Thus the Court of Appeals has decided a federal question in a manner which conflicts with an applicable decision of this Court. This basic conflict

is sufficient to trigger this Court's supervisory powers to insure that important constitutional rights of those accused of crimes are not eroded or diminished. The full extent of this erosion is set forth in the following arguments.

No inquiry as to the competency of witness Robert Schmidt was made by the trial judge. The test for competency, announced in *District of Columbia v. Armes*, 107 U.S. 519 (1882), is whether the witness has sufficient understanding to apprehend the true obligation of an oath and to be capable of giving a correct account of the matters to which he is testifying. Admittedly, it rests with the discretion of the trial court as to the form of a hearing to determine competency of a witness. There is no requirement of a formal hearing. But when the court is put on notice of a witness's confinement in a mental hospital, making no inquiry at all is an abuse of the trial court's discretion. Such inquiry must be made as satisfies the court that the witness is competent to testify. *United States v. Gerry*, 515 F. 2d 130 (1975).

Error was made in not making an inquiry into the competence of Robert Schmidt where that competence was questioned by the defense counsel and where the existence of such a question was corroborated by the prosecution. See page 85 of the trial transcript, Appendix, page 25. This error prejudiced the petitioner.

The jury was not informed of all the relevant evidence on the question of Robert Schmidt's credibility. While the court is responsible for determining the competency of a given witness, it remains the task of the jury to decide the credibility of that witness. Therefore, the jury should be informed of all matters affecting a witness's credibility to aid in their determination

of the truth. *United States v. Partin*, 493 F. 2d 750 (5th Cir. 1974). Full cross examination into a relevant area such as credibility is a right and the court's discretion to limit the cross examination does not arise until the party has had an opportunity to exercise the right of cross examination. *United States v. Greenberg*, 423 F. 2d 1106 (5th Cir. 1970). In the instant case, Vito Mango was denied this opportunity to fully cross examine witness Schmidt. Such a denial is constitutional error of the first magnitude. *Smith v. Illinois*, 390 U.S. 129 (1968).

The gravity of this error is enhanced when one considers that this is a criminal case. As such, it involves serious and substantial rights of the petitioner. It is important in dealing with such rights to use every safeguard to ascertain the truth. *McConnell v. United States*, 393 F. 2d 404 (5th Cir. 1968), held that great latitude should be given to cross examination in criminal cases because full scope cross examination as to the credibility enhances the jury's ability to find the truth. Here, cross examination as to credibility was improperly restricted and the petitioner was prejudiced by this restriction.

28 U.S.C. Federal Rules of Evidence, Rule 607, states that the credibility of a witness may be attacked by any party. Particularly where the government's case may stand or fall on the jury's belief or disbelief of one witness, the credibility of that witness should be carefully inquired into and closely scrutinized. Gordon v. United States, 344 U.S. 414 (1952). Here, if the jury had not believed witness Schmidt, there would have been no conviction on the mail fraud charge, at the very least, and most probably there would have been no conviction on any charge, since all charges

were of necessity interrelated under the ambit of the racketeering charge. Witness Schmidt's credibility should have been subject to close scrutiny. His prior commission to a mental hospital bore on his reliability, comprehension and credibility and should have been examined carefully. Instead, defense counsel was prohibited from even approaching this area.

As seen by the *McConnell* and *Partin* cases cited above, criminal defendants have a right to a full effective cross examination as to the credibility of those who testify against them. The recent case of *Davis v. Alaska*, supra, reaffirms this fundamental principle. In that case, Green, a juvenile on probation for two burglary charges, testified against Davis, accused of burglary in another case. At the time of the trial, Alaska had a statute prohibiting the disclosure of juvenile criminal records. This statute was held by the Alaska Supreme Court to bar Defendant Davis from inquiring on cross examination as to witness Green's juvenile record.

In reversing, the United States Supreme Court held that denial of the right to effective cross examination would be "constitutional error of the first magnitude" and no amount of showing of want of prejudice would cure it.

In *Davis*, Alaska was pursuing the state policy of letting juvenile offenders live down their youthful mistakes. The court in the case at bar was not pursuing any ascertainable policy. In any event, in *Davis*, the restriction was held to be constitutional error of the first magnitude where a state statute and a strong state interest were involved. Here there is no strong state interest that militates against full cross examination. The basis for the restriction of cross examination

in the case at bar does rise to anywhere near the strength of the arguments in support of the restrictive cross examination in *Davis*. The restrictions in *Davis* were held to be constitutional error of the first magnitude. So, too, then are the restrictions imposed at trial in this case error of the first magnitude. *Davis* is controlling herein, and the order of the Court of Appeals is clearly contrary to the *Davis* holding.

Impeachment in the case at bar was not calculated to humiliate or degrade witness Schmidt. As stated above, the credibility of a witness is a relevant issue and may be questioned or attacked by any party. Evidence of insanity is admissible for and relevant to the credibility of a witness. *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950). Evidence of conviction and confinement for a felony offense is similarly admissible and relevant. Indeed it is error to keep such evidence from the jury.

Error such as this denied petitioner due process of law by denying him his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. The Confrontation Clause means that a criminal defendant is entitled to a full, effective cross examination of all witnesses against him. Petitioner Vito Mango was denied this right when prohibited from inquiring into the credibility of witness Schmidt.

Even if it be found that no one of these errors was prejudicial, which petitioner expressly denies, when all of the aforementioned errors are cumulated, they are clearly prejudicial to the petitioner. The net result was that the jury received absolutely no evidence as to Schmidt's mental capacity or criminal record. If they had, they may not have believed Schmidt and they may have acquitted the petitioner.

Since all counts in the indictment are interrelated, grievous error in the trial of any one or more requires re-trial of all counts. When Union Racketeering is charged under Title 18 U.S.C. §§1961, 1962, and 1963, the requirement of proof beyond a reasonable doubt of a "pattern of racketeering activity" renders all charges in such an indictment interrelated. Error in the trial of one of the courts relating to the predicate criminal activity requires a re-trial of all the counts. This is particularly true where the grievous error occurs in the one count of a multiple count indictment that clearly carries a connotation of organized crime or racketeering. The charge of mail fraud under Title 18, U.S.C. §1341 carries such a connotation. And it was precisely upon this count of mail fraud that the prosecution most heavily relied upon the testimony of Robert Schmidt.

Finally, petitioner contends that his convictions for racketeering and embezzlement were inconsistent and against the manifest weight of the evidence.

The trial court should have granted the defense motion for acquittal as to the racketeering charge because the Government failed to prove a factual nexus combining the predicate criminal acts charged into a "pattern of racketeering activity" by evidence sufficient to sustain conviction. The language of Title 18 U.S.C. §1961, 1962, and 1963 requires proof beyond a reasonable doubt of a "pattern of racketeering activity". *United States v. Campanale*, 518 F. 2d 352 (1975). The evidence produced by the Government in this case contained no explanation or rationale fitting the alleged acts of the petitioner into a pattern of unlawful conduct.

Counts three (III) and eight (VIII) arose from the

same fact situation and logically should be treated together. Count III involved an expenditure of Two Thousand Fifty-Seven Dollars and Twenty Cents ($2,257.20) for a Lear Jet flight from Columbus, Ohio to Chicago, Illinois and return in April of 1976 for the petitioner, Jerry Payne and two companions. Count VIII of the Indictment involved hotel charges arising out of that same trip to Chicago in the amount of One Hundred and Eight Dollars and Twenty-Six Cents ($108.26). The Government contended that the petitioner was guilty of embezzlement of those two amounts because the trip was not for Union purposes and was solely a pleasure excursion for petitioner and his three companions. Evidence from the Government's own witness, however, did not bear this out, but rather showed that the Chicago trip was a meeting that the petitioner and the Union Vice-President attended in the course of negotiations for a Union Dental Services Plan. The Government's evidence on these two counts—the expenditure for the Lear Jet and the expenditure for hotel rooms—clearly is insufficient to support a conviction on Counts III and VIII.

Count four (IV) in the Indictment involved an expenditure of Ninety-Five Dollars and Twenty-Seven Cents ($95.27), for an airline ticket for Wilma Lannan. The Government's evidence at best could have proved that the petitioner may have offered to permit Wilma Lannan to misuse his union credit card, but that she did not use it. The evidence shows that instead, she made the unauthorized use of a different union credit card—one not under the control of the petitioner. This use cannot constitute a criminal offense on the part of the petitioner.

Count seven (VII) dealt with an expense of Seventy-Four Dollars and Thirty-Four Cents ($74.34). The Government's evidence tends to show that a printing company overcharged the union by that amount. There is no evidence that the petitioner intended to spend more money that was authorized or ever knew that he had been overcharged.

CONCLUSION

Petitioner submits that the time is ripe for a plenary review of the substantial constitutional and related legal questions involved in the present case. For the foregoing reasons petitioner, Vito Mango, respectfully prays that a writ of certiorari be granted.

Respectfully submitted

THOMAS L. TWYFORD
Attorney for Petitioner
TWYFORD AND DONAHEY
501 South High Street
Columbus, Ohio 43215
(614) 224-8166

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing Petition for a Writ of Certiorari was served upon Stephen R. Olah and Marye Wright, United States Attorneys, P.O. Box 899, Ben Franklin Station, Washington, D.C., 20044, by regular U.S. mail this ..... day of ....., 1977.

THOMAS L. TWYFORD
Attorney for Petitioner

APPENDIX

No. 76-2615

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

VITO MANGO

Defendant-Appellant

Filed June 21, 1977

ORDER

Before: PHILLIPS, Chief Judge, and CELEBREZZE and PECK, Circuit Judges.

This appeal, perfected from a judgment of conviction entered pursuant to a jury verdict finding defendant-appellant guilty of mail fraud, embezzlement and conducting a labor union's affairs through a pattern of racketeering activity, has been submitted on the record on appeal and on the briefs and arguments of counsel. Appellant's principal contentions concern the trial court's refusal to conduct or to permit a voir dire examination as to the competence of a witness whose testimony was largely corroborative or to permit cross-examination into the area of such competency, and the alleged insufficiency of the evidence to support the verdict of the jury. In the circumstances disclosed by the record it is concluded that no abuse

of discretion on the part of the trial judge in excluding the voir dire examination or in such limitation of cross-examination as may have occurred has been shown, and that the jury's verdict is supported by admissible evidence in the record. Accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, *Clerk of Court*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

VITO MANGO,

Defendant.

Criminal No. 2-76-67

Violations: 18 U.S.C. §§1961, 1962(c), 1963, 1341 and 2
29 U.S.C. §501(c)

INDICTMENT

The Grand Jury charges:

COUNT I

1. At all times material to this indictment, and specifically from on or about the 8th day of January, 1974, up to and including on or about the 9th day of February, 1976:

A. International Brotherhood of Teamsters, Local 413, Columbus, Ohio, was a "labor organization" within the meaning of the Labor Management Reporting and Disclosure Act of 1959, and was "an enterprise" as defined by Title 18, United States Code, Section 1961(4).

B. Defendant VITO MANGO was the President of

the International Brotherhood of Teamsters, Local 413, Columbus, Ohio.

2. That from on or about the 8th day of January, 1974, up to and including the 9th day of February, 1976, in the Southern District of Ohio, Eastern Division, and elsewhere, VITO MANGO, the defendant herein, being a person employed by or associated with an enterprise engaged in, and the activities of which affected interstate commerce, to wit: International Brotherhood of Teamsters, Local 413, Columbus, Ohio, did unlawfully, willfully, and knowingly conduct and participate, directly or indirectly, in the conduct of such enterprise's affairs through a patter of racketeering activity, to wit: use of the United States mails in furtherance International Brotherhood of Teamsters, Columbus, Ohio, in violation of Title 18, United States Code, Section 1341, as charged in Count II of this Indictment, which is alleged and incorporated in this Count by reference as if fully set forth herein; and embezzlement of assets (unlawful and willful abstraction and conversion of the funds) of Local 413, International Brotherhood of Teamsters, Columbus, Ohio, in violation of Title 29, United States Code; Section 501(c), as charged in Counts III through VIII of this Indictment, which are alleged and incorporated in this Count by reference as if fully set forth herein.

3. Through the aforedescribed pattern of racketeering activity, defendant VITO MANGO did utilize his interest in substantial sums of money in furtherance of the affairs of the International Brotherhood of Teamsters, Local 413, Columbus, Ohio, thereby making such interest subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a).

In violation of Title 18, United States Code, Sections 1961, 1962(c), 1963, and 2.

The Grand Jury further charges that:

COUNT II

1. Beginning on or about the 1st day of February, 1975, and continuing thereafter up to and including the 13th day of February, 1975, inclusive, the exact dates being to the Grand Jury unknown, in the Southern District of Ohio, Eastern Division, VITO MANGO, the defendant herein, devised and intended to devise a scheme and artifice to defraud the membership of Local 413, International Brotherhood of Teamsters, by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that said pretenses, representations, and promises would be and were false when made.

Said scheme and artifice, representations, and promises were as follows:

That the defendant would propose that the dues of the members of Local 413, International Brotherhood of Teamsters be raised;

That the defendant would cause sixteen hundred (1600) additional ballots, more or less, to be printed;

That the defendant would cause the sixteen hundred (1600) ballots, more or less, to be fraudulently marked in favor of the dues increase;

That the sixteen hundred (1600) ballots, more or less, were ordered and marked without the knowledge of the membership of Local 413, International Brotherhood of Teamsters.

2. On or about the 13th day of February, 1975, in the Southern District of Ohio, Eastern Division, VITO MANGO, the defendant herein, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly caused to be delivered by mail, according to the direction thereon, numerous ballots addressed to Teamsters Union Local 413, P.O. Box 1119, Columbus, Ohio 43216.

In violation of Title 18, United States Code, Sections 1341 and 2.

The Grand Jury further charges that:

COUNT III

On or about the 24th day of September, 1974, in the Southern District of Ohio, Eastern Division, VITO MANGO, the defendant herein, while an officer, that is, President of Local 413, International Brotherhood of Teamsters, a labor organization engaged in an industry affecting commerce as defined by Sections 402(i) and 402(j), Title 29, United States Code, did embezzle, steal and unlawfully and willfully the moneys, funds, securities, property and their assets of said labor organization in the amount of $2,257.20.

In violation of Title 29, United States Code, Section 501(c); and Title 18, United States Code, Section 2.

The Grand Jury further charges that:

COUNT IV

On or about the 28th day of July, 1974, in the Southern District of Ohio, Eastern Division, VITO MANGO, the defendant herein, while an officer, that is, President of Local 413, International Brotherhood of Teamsters, a labor organization engaged in an

industry affecting commerce as defined by Sections 402(i) and 402(j), Title 29, United States Code, did embezzle, steal and unlawfully and willfully abstract and convert to his own use and the use of another, the moneys, funds, securities, property and other assets of said labor organization in the amount of $95.27.

In violation of Title 29, United States Code, Section 501(c), and Title 18, United States Code, Section 2.

The Grand Jury further charges that:

COUNT V

On or about the 1st day of September, 1974, in the Southern District of Ohio, Eastern Division, VITO MANGO, the defendant herein, while an officer, that is, President of Local 413, International Brotherhood of Teamsters, a labor organization engaged in an industry affecting commerce as defined by Sections 402(i) and 402(j), Title 29, United States Code, did embezzle, steal, and unlawfully and willfully abstract and convert to his own use and the use of another, the moneys, funds, securities, property and other assets of said labor organization in the amount of ? ? ? ? ? ? .

In violation of Title 29, United States Code, Section 501(c); and Title 18, United States Code, Section 2.

The Grand Jury further charges that:

COUNT VI

On or about the 2nd day of October, 1974, in the Southern District of Ohio, Eastern Division, VITO MANGO, the defendant herein, while an officer, that is, President of Local 413, International Brotherhood

of Teamsters, a labor organization engaged in an industry affecting commerce as defined by Sections 402(i) and 402(j), Title 29, United States Code, did embezzle, steal, and unlawfully and willfully abstract and convert to his own use and the use of another the moneys, funds, securities, property, and other assets of said labor organization in the amount of $1,497.00.

All in violation of Title 29, United States Code, Section 501(c); and Title 18, United States Code, Section 2.

The Grand Jury further charges:

COUNT VII

Between on or about the 1st day of August, 1975, and on or about the 3rd day of September, 1975, in the Southern District of Ohio, Eastern Division, VITO MANGO, the defendant herein, while an officer, that is, President of Local 413, International Brotherhood of Teamsters, a labor organization engaged in an industry affecting commerce as defined by Sections 402(i) and 402(j), Title 29, United States Code, did embezzle, steal and unlawfully and willfully abstract and convert to his own use and the use of another the moneys, funds, securities, property and other assets of said labor organization in the amount of $74.34.

In violation of Title 29, United States Code, Section 501(c); and Title 18, United States Code, Section 2.

The Grand Jury further charges that:

COUNT VIII

On or about the 28th day of May, 1974, in the Southern District of Ohio, Eastern Division, VITO

MANGO, the defendant herein, while an officer, that is, President of Local 413, International Brotherhood of Teamsters, a labor organization engaged in an industry affecting commerce as defined by Sections 402(i) and 402(j), Title 29, United States Code, did embezzle, steal and unlawfully and willfully abstract and convert to his own use and the use of another the moneys, funds, securities, property, and other assets of said labor organization in the amount of $108.26.

In violation of Title 29, United States Code, Section 501(c); and Title 18, United States Code, Section 2.

This is a True Bill.

JOHN M. ARNOLD
Foreman

WILLIAM W. MILLIGAN
United States Attorney
Southern District of Ohio

Date: 1/6/76

[p. 84]

The Court: We will take our afternoon recess.

(Thereupon the Court gave the jury its usual admonition, followed by a recess.)

Thereupon, out of the hearing of the jury, the following proceedings were had:

Mr. Scott: I have been advised at the present time by The United States Attorney, Mr. Steve Olah, that the next witness is going to be a Mr. Robert Schmidt.

I have further been advised that I have information that leads me to believe that this man has been either

hospitalized or declared incompetent by a court of competent jurisdiction, and the extent of his treatment, if any, the duration of his treatment, if any, the degree of his competence, if any, is unknown to the undersigned.

It is for that reason that I am requesting this Court [p. 85]to require a voir dire examination to determine the competency of the witness, which voir dire examination I have been denied by the Court.

In addition thereto, I am being deprived the right to inquire into said competency, and I am further being restricted not even to be able to ask the question on the witness stand of whether the person has ever been in a mental institution.

For this reason it appears to me that my client, Mr. Vito Mango, is being denied due process of law and the right of full cross-examination as required under the statute.

Mr. Olah: On behalf of the Government, I would like the record to be clear that I advised Mr. Scott that I was advised by Mr. Schmidt when he was pretried last Wednesday for the first time, that there was a time in which he was institutionalized.

I do not know when this institutionalization occurred. I do not know the reason for it, the duration of the institutionalization.

Thereupon, in the hearing of the jury, the following proceedings were had:

The Court: Call your next witness.

Mr. Olah: Your Honor, before calling our next witness, at this time the Government would offer [p. 86] Exhibits 1, 2, 3, 4 and 4-A as full exhibits, and offer them into evidence at this time.

Mr. Scott: Let the record show Mr. Vito Mango has no objections to Exhibits No. 1, No. 2, No. 3, No. 4 and No. 4-A, Your Honor.

The Court: They are admitted without objection.

Thereupon, the exhibits last above offered were admitted into the record of this action, on behalf of the Government, marked Exhibits 1, 2, 3, 4, and 4-A.

Mr. Olah: The Government at this time would call Robert Schmidt to the stand.

ROBERT SCHMIDT

Called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Olah:

Q. Mr. Schmidt, I would ask that you speak up in the direction of the jury so everyone can hear you.

Your current address, Mr. Schmidt?

A. 530 Longhurst Drive, Apartment 1.

Q. In what city is that located? [p. 87] A. Columbus, Ohio.

Q. Are you currently employed? A. Yes, sir.

Q. Where are you employed? A. General Highway.

Q. In what capacity? A. Truck driver.

Q. How long have you been so employed? A. With General Highway, six years, and all total 19 years, or thereabouts, 18.

Q. Are you a member of a labor union? A. 413.

Q. The Teamsters Local 413? A. Teamsters Local 413.

Q. How long have you been a member of Local 413? A. Since October 1958.

Q. Do you know Vito Mango? A. I do.

Q. Do you see Mr. Mango in the courtroom? A. Yes, I do.

Q. Would you point him out for us, please? A. Right over there.

Mr. Scott: Same stipulation.

By Mr. Olah:

Q. How long have you known Mr. Mango, Mr. Schmidt? [p. 88] A. About 18 or 19 years.

Q. Calling your attention to the early part of 1975, are you familiar with the election for an increase in the Union dues at Local 413? A. Yes, I am.

Q. Did you in fact receive a ballot for that election? A. Yes, sir.

Q. Calling your attention to that month of that year, specifically February of 1975, did you have occasion to go to the home of Vito Mango one evening? A. Yes, I did.

Q. What was the purpose of your going to Mr. Mango's home? A. I was taking his brother's car back.

Q. Do you know where Mr. Mango was residing at the time? A. Yes. I can't think of the name of the street. I know how to get there. You go up Route 33 to Lane Road—not Lane Avenue—turn off, and that's the first—

By the Court:

Q. There is a Lane Avenue and a Lane Road that goes off of Route 33; which one? A. Lane Road.

Q. That's farther north; isn't it? A. Yes, sir.

By Mr. Olah:

Q. Do you know what suburb this is in? [p. 89] A. Yes, Upper Arlington. I know how to get to his house.

Q. Did you go into Mr. Mango's home that evening? A. Yes, I did.

Q. Did you go into any particular part of the home? A. The basement.

Q. Did you see anyone there? A. I seen Vito, Mike Mann, Dave Mango, and Jim Kirk.

Q. Where were they? A. In the basement.

Q. What, if anything, were they doing? A. Marking ballots.

Q. Did you observe this? A. Yes.

Q. Did you engage in conversation with Vito Mango at this time? A. Yes, sir.

Q. What, if anything, did he say to you? A. Get a pencil and start marking.

Q. Did you do that? A. I sure did.

Q. What specifically did you do that evening, Mr. Schmidt? A. I marked ballots and put ballots in envelopes, and that was all.

Q. Did you mark the ballots in any particular way? [p. 90] A. Yes, yes for the increase.

Q. Would you explain that a little bit? What do you mean? A. I forget how it read, something about, you know, you mark it yes if you want the increase; no if you don't.

Q. How did you mark the ballots? A. Yes, wanted the increase.

Q. Did anyone tell you to mark them yes? A. Yes, Vito did.

Q. Vito Mango? A. Yes, sir.

Q. What time of the evening approximately did you arrive? A. It was late. I would say 11:00 or 12:00 o'clock. It was awful late; I know that.

Q. How late did you say? A. It was morning when we left, I mean, you know, I think I got to the restaurant just before six o'clock, 15 minutes from his house to the restaurant.

Q. After you placed the ballots into the envelopes,

were you asked to do anything else? A. Yes, I was asked to put stamps on them.

Q. By whom? A. By Vito.

Q. Did you do that? [p. 91] A. Nope.

Q. Did you overhear—

By the Court:

Q. You say you did or you didn't? A. No, I didn't.

By Mr. Olah:

Q. Did you overhear Mr. Mango instruct anyone else to put stamps on the envelopes? A. Yes, I did.

Q. Did you observe anyone putting stamps on the envelopes? A. Yes, I did.

Q. Who? A. Vito Mango, Dave, and Mike Mann and Kirk, Jim Kirk.

Q. Did you have any other conversation with Mr. Mango? A. Yes, I was trying to get somebody to take me back to my car.

Q. Did you overhear Mr. Mango give any instructions to anyone else concerning anything else? A. Yes, about where to—I think he told Mike Mann to go to—I think it was Mike he told to go to Delaware and mail his, you know, put them in different mail boxes. He told someone to go out east with a handful of them and put them in different mail boxes, and someone was to drop some off in the south and someone was to drop some off in the [p. 92] west side, west end.

Q. Did he ask you to mail any of these ballots? A. No, he didn't.

Q. Did you overhear him ask others? A. Yes, he did.

Q. Did he ask or did he instruct? A. He instructed, I guess is what you call it.

Q. Was anyone else giving any of these instructions on mailing other than Vito Mango? A. No, no, sir.

Mr. Olah: Nothing further, Your Honor. Thank you.

The Court: You may cross-examine, Mr. Scott.

CROSS-EXAMINATION

By Mr. Scott:

Q. Mr. Schmidt, back in the early part of 1975 where were you residing? A. 530—no, wait a minute. I think at the very first of the year I was living with my dad.

Q. Particularly when did this so-called election occur, if you recall, Mr. Schmidt? A. It was in the first part of last year.

Q. When? A. I don't know, January or February. I mean, I don't [p. 93] know the exact date, but I would say it was either the last of January or first part of February sometime.

Q. What job were you working at that time? A. Driving truck.

Q. Do you now have an independent recollection of where you were living? A. That I am not sure of because I had been in a truck wreck and I had been living with my dad for a long time because I couldn't walk. I think I moved in that apartment out there in March. I wouldn't swear to that.

Q. As I understand it from your testimony, the reason that you were there is that you had someone's car? A. Yes, sir.

Q. Whose car did you have? A. Dave Mango's.

Q. Would that be the brother of Mr. Vito Mango? A. Yes, it would.

Q. What were you doing with his car? A. It was a Union car that was assigned to Dave Mango and he gave me to use, let me use it that day to do some of their work. That's what it amounted to.

Q. Were you a business agent? A. Nope.

Q. Did you hold any type of supervisory capacity with the Union other than being a member? [p. 94] A. Nope.

Q. As a matter of fact, you weren't employed at that time; were you? A. Yes, I was.

Q. I thought you had just been in a truck accident? A. I was in a truck accident in '72, and I didn't work for 10 months on account of I got a broken leg and femur bone, and I lived with my dad for 10 months. Then I got back to work, then they had a steel bar in my legs and I had to miss two more months of work while they took the bar out, and that's when I was living out there, and I finally got back to work.

Q. In '72 when you had the truck accident and you lived with your dad for 10 months at the most, that would take you into '73, correct, or maybe the first part of '74? A. Yes.

Q. Is that right? A. I don't know exactly what the dates were. I could find out when I signed my lease out there.

Q. Were you living with your father at that time?

Mr. Olah: I am going to object, Your Honor, to the relevance of this line of cross-examination.

The Court: Oh, I think this is all right. I will overrule your objection at this time.

May I ask a question? [p. 95]

Mr. Scott: Yes, sir.

By the Court:

Q. Mr. Schmidt, the activity that went on in Vito Mango's basement as you have testified when you took the car back to his brother, Dave Mango that evening, do you remember when that took place? A. Yes, sir, February of last year.

Q. February of last year? A. Yes.

Q. Were you employed at that time? A. Yes, sir.

Q. Were you working? A. Yes, sir.

Q. Who were you working for? A. General Highway.

Q. You were driving a truck? A. Yes, sir.

Q. Do you recall where you were living at that time in early February or in February of 1975? Are you living in a different place now? A. No, sir, I am still in the same place but I can't remember when I moved there, because when I got out of the hospital I was off for eight months.

Q. At least the time that you went to Vito Mango's house and you say you got there very late in the evening, you [**p. 96**] were there all night, you left there about a quarter of six and went to the restaurant. That was in February of 1975? A. Yes, sir.

Q. Are you living in the same place now that you lived then? A. In February of 1975 is when I moved in that apartment.

Q. Where is that? A. 530 Longhurst Drive.

Q. You were living there then in February of 1975; you think you were? A. Yes, I moved in in the middle of that month, and I don't know exactly what date I did move in.

The Court: Go ahead, Mr. Scott.

By Mr. Scott:

Q. Mr. Schmidt, before you came to Mr. Mango's house, where had you been? A. In Wellston, Ohio.

Q. What were you doing in Wellston, Ohio? A. Working in his grocery store.

Q. You received a call to come up, or you were just going up to return the car of Mr. David Mango? A. I was just going up to return the car.

Q. What type of work were you doing for Mr. David Mango [**p. 97**] that required you to use his car? A. I wasn't doing work for David Mango.

Q. Why did you use his car? A. Because Vito told him for me to use it, had me use it.

Q. Vito told him to have you use it? A. That's right.

Q. You are quite sure of that? A. I am positive.

Q. You are sure you just didn't have tire trouble with your car and that's— A. That's why, and I told him I ain't taking any car down to his store with no spare tire, so he told David for me to use his car.

Q. So, you are talking about tires on your car? A. That's right.

Q. That's the reason why you had Dave Mango's car? A. The reason I had Dave Mango's car is because I didn't have a spare and I was to go down to Wellston to Hogan's Market, which is Vito's and work, and I took David's car.

Q. On the way back to Columbus did you stop any place? A. Yes.

Q. Tell us where you stopped. A. I stopped at—I can't think of the name of that town—Bloomfield, South Bloomfield. I never can remember [**p. 98**] the name.

Q. What time was it when you got to South Bloomfield? A. Oh, I would say 10:20, something like that, a little after 10:00.

Q. How long a drive is it from Wellston to South Bloomfield? A. About an hour and 20 minutes.

Q. Would you tell the jury where you stopped at South Bloomfield? A. Yes, I stopped in a little bar there.

Q. Was this a habit of yours, stopping at the bar? A. Well, it is not only my habit, it is also the Defendant's habit. When he comes, he brought me back, he always stopped there with me.

Q. The question was: Is it your habit, Mr. Schmidt? A. Occasionally I stop for a beer, right.

Q. The question is: Is it your habit? A. No.

The Court: The witness has answered the question, and I think that that's irrelevant, so let's go on. I know what you are doing.

By Mr. Scott:

Q. Do you remember making this answer to the Grand Jury that you testified before:

"It was my habit always stopping there on the way [p. 99] back, at a beer joint, and I stopped there and had beer."

A. What do you call a habit? I only went down to Wellston once a week.

Q. Forget it. A. I mean—

Q. How much did you have to drink there? A. Probably two beers.

Q. Then where did you go? A. I went to the Holiday Inn downtown is where I had picked up David's car and left my car.

Q. When you stopped in the Holiday Inn downtown, you also stopped by some place else; didn't you? A. No, I drank the beer right there.

Q. Didn't you go into the lounge of the Holiday Inn and have a beer there? A. Yes, that's what I just said. I drank the beer there. When I called Dave, trying to tell him his car was back, sure I had a beer there.

Q. You further indicate that you made a call to Mr. Mango's house; is that correct? A. David's house first, right.

Q. How did you get a hold of Mr. Vito Mango? A. Dave's wife told me he was over at Vito's house, so I called Vito's.

Q. So you called Mr. Mango's house? [p. 100] A. Called Mr. Mango's house, right, both of them.

Q. So after you stopped at South Bloomfield, after you stopped at the Holiday Inn, what time did you get over to Mr. Vito Mango's house? A. Between 11:00 and 12:00 o'clock at night.

Q. Do you remember the street that he lives on? A. No, I was trying to think about that. I know it is a court. It is the second court off of Lane Road.

Q. How many beers, if any, did you have over there? A. At Vito's house? Well, in the course of six hours I was there, I probably drank two or three, but I was there six hours.

Q. Two or three? A. In six hours, yes.

Q. Do you remember telling the Grand Jury that you drank the beer, about 20 minutes it takes you to drink a beer? A. That's all it does take me.

Q. So you were only there about an hour? A. Where?

Q. At Mr. Vito Mango's house. A. No, I was there until about 6:00 o'clock in the morning, but they had me too busy working on ballots to drink beer.

Q. Do you remember the question being asked, on Page 125, Line 7— [p. 101]

The Court: Just a minute. Come up here, gentlemen. Come up here, Mr. Scott and Mr. Olah.

(Discussion off the record.)

The Court: Go ahead, Mr. Scott.

By Mr. Scott:

Q. Mr. Schmidt, my question was to you: How long were you at Mr. Vito Mango's house? A. Oh, I would say between five and seven hours. I don't know precisely. I got there a little after 11:00 and I didn't leave until just before 6:00 in the morning.

Q. Your testimony is that you had probably two beers to drink during that period of time? A. Maybe three even, but that's six hours.

Q. Maybe three, that's six hours. How do you figure that? A. I was there for six hours at Vito's house.

Q. Do you remember the question being asked, Page 125 of the Grand Jury:

"How long were you there?

"Answer: I was there probably four hours. It takes about 20 minutes for a beer, so it would be about an hour average."

Do you remember that question and that answer being given to the Grand Jury?

A. No, I don't remember how I answered that question. I [**p. 102**] do know how long I was there.

Q. Were you under oath then? A. Yes, and I am under oath right now.

Q. What did you mean, it takes about 20 minutes for a beer, so it would be about an hour average? A. If I sit down with you and we just steady drink beer, it is 20 minutes a beer. If I am working, that beer might take me two hours to drink because I am working and I will sip.

Q. Mr. Schmidt, do you have an independent recollection of how much beer you consumed that evening? A. No. I would say somewhere in the neighborhood of five or six bottles, maybe seven, but that was all night until six o'clock in the morning, man, you know. I was there until almost six. I know that. I got to the restaurant—just as I got to the restaurant, almost six o'clock, I know that.

Q. You are telling this jury at no time did anybody ask you to mail a ballot at all; did they? A. No, they didn't.

Q. You didn't see any ballots being mailed; did you? A. No, I didn't.

Q. You remember testifying on direct examination that when you got to Mr. Mango's house you said that Vito was there, Mike Mann was there, Dave Mango, Jim Kirk? [**p. 103**] A. Yes.

Q. Do you remember you testified before at the Trusteeship of Local 413 as to who was allegedly there during that evening that the ballots were being marked? A. Well, if I am not mistaken, I don't believe I testified like that in front of the Trustee hearing.

Q. You have no independent recollection of testifying before the Trustee Board? A. I do, but not that way. I had nothing to do with that, I don't believe. I don't really remember. It wasn't that important to me.

Q. Wasn't that important to you? A. No, I don't think I did say anything about ballots at that. I don't think it was ever brought up to me.

Q. Page 80 of that transcript:

"All right. It was down in the basement.

"Question: Whose basement?

"Answer: Vito Mango's basement.

"Question: All right.

"Mr. Schmidt: And we concocted 2000 phony votes."

"Chairman: Who is we?

"Schmidt: Myself, Vito Mango, Dave Mango."

Do you remember giving those answers?

A. Yes, I probably did.

Q. To those questions being asked? [**p. 104**] A. Yes.

Q. Do you now have an independent recollection?

A. Yes, but that doesn't even concern me, so I didn't even care about it. That's a different court than this one.

Q. Didn't you swear to tell the truth? A. I told the truth at that time, and I told the truth this time.

Q. Are you finished? A. Yes.

Q. Didn't you swear to tell the truth when you testified before the Grand Jury? A. Yes.

Q. Didn't you swear to tell the truth today? A. Sure did.

Q. Do you want to correct any of those statements that you made under oath at the present time? A. No.

Mr. Scott: Your Honor, may I be excused?

(Discussion at Defense counsel table.)

Mr. Scott: If the Court pleases, that terminates my cross-examination.

The Court: Do you have any questions on redirect examination, Mr. Olah?

Mr. Olah: Nothing on redirect, Your Honor.

(Witness excused.)

Supreme Court, U. S.
FILED
DEC 9 1977
MICHAEL RODAK, JR., CLERK

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v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 16-17) is not reported (see 559 F. 2d 1222).

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1977. The petition for a writ of certiorari was filed on July 22, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to conduct a *voir dire* examination on the issue of the mental competency of a government witness and in

refusing to allow cross-examination of that witness as to whether he had ever been institutionalized due to mental illness.

2. Whether the evidence was sufficient to support petitioner's convictions on the embezzlement and racketeering counts of the indictment.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of four counts of embezzlement (counts 3, 4, 7 and 8), one count of mail fraud (count 2), and one count of engaging in a pattern of racketeering activity (count 1), in violation of 29 U.S.C. 501(c), 18 U.S.C. 1341, and 18 U.S.C. 1962(c), respectively.[1] Petitioner was sentenced to six years' imprisonment on count one and five years' imprisonment on each of the remaining counts, all sentences to be served concurrently. The court of appeals affirmed (Pet. App. 16-17).

All of the acts alleged in the indictment occurred between April 1974 and February 1975, when petitioner was president of Local 413 of the International Brotherhood of Teamsters in Columbus, Ohio. The evidence adduced at trial, which is set out in pertinent part in more detail below, showed that on two occasions petitioner and others made unauthorized trips from Columbus to Chicago at union expense (counts 3, 4, and 8) and also that union funds were spent to purchase ballots and envelopes that were used by petitioner to fix a union election (counts 2 and 7). Based on all these incidents, as well as evidence of two other embezzlement schemes, petitioner also was convicted of engaging in a pattern of racketeering activity (count 1).

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[1]Petitioner was acquitted on two counts of embezzlement (counts 5 and 6).

ARGUMENT

1. Petitioner contends (Pet. 7-11) that the trial court erred in refusing to conduct a *voir dire* hearing to determine whether a government witness, Robert Schmidt, had once been in a mental institution; he further urges that the trial court improperly limited cross-examination of the witness on this issue.[2] Prior to trial government counsel had advised defense counsel that Schmidt had at one time been institutionalized but that government counsel did not know when this occurred, its duration, or its cause (Tr. 85). (In its brief to the court of appeals in this case (p. 18, n. 10), the government stated that it subsequently learned that Schmidt had spent two months in a state hospital in 1958 or 1959 because of a virus in the lining of his brain but that he had not been in a hospital for a mental disorder since that time.)

a. Petitioner's first claim must be assessed against the backdrop of Rule 601 of the Federal Rules of Evidence, which provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." Petitioner does not claim the benefit of any other provision of the Rules governing competency and, indeed, none of them is relevant. Whatever may previously have been the federal standard for determining mental competency, "[n]o mental * * * qualifications for testifying as a witness are specified" in the new Federal Rules of Evidence (Advisory Committee Notes to Rule 601, 28 U.S.C. (Supp. V), p. 2330). As the Advisory Committee

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[2]Schmidt's testimony went only to count 2 of the indictment, on which petitioner's five-year sentence is concurrent with a six-year term on count 1 and four five-year terms on counts 3, 4, 7 and 8. Since petitioner's challenge to his conviction on these other counts is insubstantial (see pp. 6-8, *infra*), the Court properly may decline to consider the question he raises here with respect to count 2. See *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

Notes state (*ibid.*): "Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine."

Schmidt's testimony is set out in the appendix to the petition (Pet. App. 26-38). It is coherent and straightforward and contains no indication that Schmidt lacked the minimum requirements to testify or that he should for any reason have been barred from testifying. Under these circumstances a competency hearing was unnecessary. Moreover, the need for a hearing to determine the competency of a witness is a matter left to the discretion of the trial court (see Pet. 8); and there is nothing here to indicate that the court abused its discretion in this regard.[3]

b. Petitioner is on no firmer ground in contending that his cross-examination of Schmidt was improperly limited.[4] As the transcript of defense counsel's cross-examination of Schmidt suggests (Tr. 92-104; Pet. App. 30-38), Schmidt had not been in any institution other than

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[3]In any event, it is plain (and petitioner does not contend otherwise) that, if a hearing had been held, Schmidt would have been adjudged competent to testify. Petitioner therefore was not prejudiced by the lack of a hearing.

[4]The record does not reveal the precise scope of the limitation, since the court's ruling was apparently made off the record and is simply referred to by petitioner's counsel at the time Schmidt was called as a witness (see Pet. App. 25). At that time petitioner asserted the right to ask Schmidt "whether [he] ha[d] ever been in a mental institution" (*ibid.*).

an ordinary hospital since 1972.[5] Petitioner certainly was not entitled, as he asserts, to inquire whether Schmidt had "ever" in his lifetime "been in a mental institution" (Pet. App. 25). The fact that a witness may at some remote time have been institutionalized does not, without more, bear upon the relevancy or competency of his testimony. Here Schmidt testified credibly and rationally, and there is otherwise nothing in the record to suggest that he suffered from a mental defect at a relevant time. Under these circumstances, there was no error in limiting the scope of cross-examination.

In any event, Schmidt's testimony, which concerned only count 2 of the indictment, was substantially cumulative of other evidence in the government's case. As to count 2, which charged petitioner with mail fraud in the conduct of a union vote, the government relied primarily upon the testimony of Michael Mann, the office manager of the local union, who testified that he ordered the blank ballots and reply envelopes from the printer, marked the ballots and put them in envelopes during the meeting at petitioner's house, mailed the envelopes to union headquarters, and later burned the reply envelopes.

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[5]Schmidt had been in a truck accident in 1972 and did not work during most of the following year, during which time he lived with his father. At the time of the union election, Schmidt said he was working regularly, and, about that time, he moved from his father's apartment, where he had been convalescing from his second operation, to his own apartment (Tr. 95-96).

During cross-examination defense counsel questioned Schmidt about the witness' drinking prior to and during the night when the ballots were marked at petitioner's home (Tr. 97-102), and about allegedly inconsistent statements the witness had made before the grand jury and in a union proceeding (Tr. 98, 100-104). In short, petitioner's counsel was permitted to engage in a thoroughgoing attempt to impeach Schmidt's testimony.

all on petitioner's orders (Tr. 7-13). The printer also testified concerning the printing of the additional ballots and envelopes (Tr. 61-73). Schmidt's testimony[6] served only as partial corroboration of what the other two witnesses had already said. Thus, if the trial court's refusal to permit cross-examination concerning Schmidt's incident of mental disorder 18 years earlier was error, it was hardly prejudicial error.

2. Petitioner challenges the sufficiency of the evidence in regard to the embezzlement and racketeering counts (Pet. 12-14). This argument also is without merit.

To prove two of the embezzlement counts (3 and 8), the government presented evidence that petitioner, without proper authorization, billed the union for a round-trip flight to Chicago for petitioner, a union vice-president, and two female companions. The foursome attended a concert and ate two meals in the company of a Chicago man who did business with the union. But no business matters were discussed (Tr. 113, 129-130, 138), and the foursome flew back to Columbus the morning after the concert.

With respect to count 4, the evidence showed that petitioner and his private secretary, Wilma Lannan, made an unauthorized trip to Chicago that was paid for with union funds. Petitioner instructed Lannan to use union credit cards to purchase two airplane tickets, one under his name and the other under the name of J. Perkins, a

[6]Schmidt, a member of the local union and a long time friend of petitioner's (Tr. 87-88), testified on direct examination that he went to petitioner's home in February 1975 and spent the night there working under petitioner's direction marking false election ballots and putting the ballots into envelopes (Tr. 88-92). He also testified that he heard petitioner order others to mail the ballots from various locations to the union headquarters in Columbus (Tr. 91-92).

business agent for the union. The secretary obtained the tickets in this manner and took the trip to Chicago under the assumed name (Tr. 144-146, 156, 168). She stayed with petitioner in Chicago, conducted no union business, and did not observe petitioner conduct any union business there (Tr. 147-148).

A fourth count of embezzlement (count 7) charged petitioner with using union money to buy the ballots and envelopes to rig the union election. Petitioner's claim that the printer merely "overcharged" the union (Pet. 14) was fully answered by the testimony of the printer (Tr. 63-64) and of the union's business manager, who ordered the additional ballots and envelopes on petitioner's instructions (Tr. 10).

The evidence on these four counts was more than adequate to support the jury's verdict. Moreover, these four instances of embezzlement, the mail fraud, and the evidence adduced in regard to counts 5 and 6,[7] are more than sufficient to constitute a "pattern of racketeering activity" (count 1). *United States* v. *Parness*, 503 F. 2d 430, 438 (C.A. 2), certiorari denied, 419 U.S. 1105. "Racketeering activity" as defined in 18 U.S.C. 1961(1)(B) and (C) specifically includes violations of 18 U.S.C. 1341 (mail fraud) and acts indictable under 29 U.S.C. 501(c) (embezzlement of union funds). In a narrow sense, the

[7]Although the jury acquitted petitioner on counts 5 and 6, this evidence could properly be considered by the jury in convicting petitioner on the racketeering count. See *United States* v. *Rowan*, 518 F. 2d 685, 698 (C.A. 6), certiorari denied, 423 U.S. 949. Count 5 charged that petitioner took a kickback from a tire salesman who sold a large number of tires to the union (Tr. 172-174). Count 6 alleged that he stole $1,500 of insurance proceeds, which he returned to the union when the shortage was discovered (Tr. 13-17).

three counts concerning petitioner's trips to Chicago are clearly related and would be sufficient to constitute a "pattern," as would the two counts concerning the election fraud. In a broader sense, all the counts show a pattern of criminal activity over an 11-month period involving petitioner's unauthorized conversion of union funds. Cf. *United States* v. *Parness, supra,* 503 F. 2d at 438; *United States* v. *Moeller,* 402 F. Supp. 49, 58 (D. Conn.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

DOJ-1977-12